No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DONALD M. FALK
Counsel of Record
Mayer Brown LLP
Two Palo Alto Square,
Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. The Increasing Criminalization of Conduct and Federalization of Criminal Law—Exacerbated by the Widespread Blanket Criminalization of Federal Administrative Regulations—Magnify the Need to Enforce the Constitutional Limits on Delegation. 5

B. Delegations of the Legislative Power to Make Criminal Laws Must Provide Constraints More Meaningful Than An "Intelligible Principle." 9

C. An "Intelligible Principle" Must Do More Than Identify the Subject Matter for Delegated Lawmaking. 11

D. The Delegation Here Cannot Be Sustained Under Any Standard. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 10

Auer v. *Robbins*, 519 U.S. 452 (1996) 8

Chevron U.S.A., Inc. v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) 7, 8

Jones v. *United States*, 529 U.S. 848 (2000) 8

J.W. Hampton Jr. & Co. v. *United States*, 276 U.S. 394 (1928) 9

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 10

Sessions v. *Dimaya*, 138 S. Ct. 1204 (2018) 9

Touby v. *United States*, 500 U.S. 160 (1991) 10, 12

United States v. *Morrison*, 529 U.S. 598 (2000) 8

United States v. *Nichols*, 784 F.3d 666 (10th Cir. 2015) 6, 11

Wayman v. *Southard*, 23 U.S. (10 Wheat.) 1, (1825) 9

Whitman v. *American Trucking Assns.*, 531 U.S. 457 (2001) 10

Yakus v. *United States*, 321 U.S. 414 (1944) 11

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONS, STATUTES AND RULES

U.S. Const., art I, § 1 3
U.S. Const., art II, § 1 3
U.S. Const., art III, § 1 3
12 U.S.C. § 1244(b) 4
34 U.S.C. § 20913(d) 3, 5, 12
S. Ct. R. 37.3(a) 1
S. Ct. R. 37.6 1

MISCELLANEOUS

1 W. Blackstone, *Commentaries on the Laws of England* 142 (1765) 6
John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991) 7
Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. Pitt. L. Rev. 1 (1996) 8
Philip Hamburger, Is Administrative Law Unlawful? 342 (2014) 9
Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469 (1996) 8

TABLE OF AUTHORITIES—continued

Page(s)

Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 6 Buff. Crim. L. Rev. 165 (2004)..... 7

Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, H.R. Serial No. 111-67, 111th Cong., 1st Sess. 6 (July 22, 2009) 6

Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Colum. L. Rev. Sidebar 102 (2013)..... 7

2 Joseph Story, Commentaries on the Constitution § 542 (1st ed. 1833) 2

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for persons accused of crime and other misconduct.[1] NACDL has thousands of members nationwide and when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. NACDL's members include public defenders, criminal defense attorneys, law professors, U.S. military defense counsel, and even judges.

NACDL strives to preserve fairness and justice within the American criminal justice system. To advance that purpose, NACDL files numerous amicus briefs each year addressing issues of importance to criminal defendants, criminal defense lawyers, and the entire criminal justice system.

This case implicates one of the most fundamental protections of liberty inherent in the separation of powers: the Constitution's structural prohibition on providing the Executive Branch with the power both to define crimes and to prosecute citizens for them. Like the related void-for-vagueness doctrine, the constitutional limits on the Congress's abil-

---

[1] All parties have consented to the filing of this brief. See S. Ct. R. 37.3(a). Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

ity to delegate its core legislative powers to the other branches protect citizens from prosecution for offenses that their elected representatives have never actually proscribed. The healthy operation of the nondelegation doctrine also reduces the risk of compounded arbitrary action that would arise if the Executive could define the legal standards for private conduct and exercise discretion in enforcing and interpreting those standards.

The present case is extreme, as it is not merely the Executive, but its prosecutorial arm, that the Congress has given the power to decide both whether to impose a criminally enforceable obligation, and what that obligation should be. Upholding such a broadly unlawful delegation could fundamentally change federal criminal law, at great cost to individual liberty. NACDL has a strong interest in preventing that result.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fundamental principles of the separation of powers, implicit in the Constitution's structure, limit what each branch of the federal government can do, and how each branch may accomplish the actions assigned to it. At the same time, the Court has long recognized that the responsibilities of the three branches necessarily overlap to some degree, particularly the responsibility of the legislative branch to enact laws and the responsibility of the executive branch to execute them. But the limited "occasional mixture of some of the powers of each" branch (2 Joseph Story, Commentaries on the Constitution § 542, at 25 (1st ed. 1833) necessary overlaps does not suggest that the separation of powers is illusory, or ex-

ists only as much as may please the particular occupants of one branch or another at a particular time.

As a consequence, the Constitution's directive that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States" (U.S. Const., art. I, § 1) provides a dividing line between those "legislative powers" and the "executive power" that is "vested in a President" (*id.*, art. II, § 1). Neither branch has the authority to shift its express "power" to the other. Indeed, the Constitution guards its assignment of legislative power most jealously, vesting "all" legislative power in the Congress, and only "the" executive and judicial powers in the other branches. *Id.*, art. II, § 1 & art. III, § 1. At minimum, then, the Venn diagram between the two branches accordingly leaves some "legislative power" that Congress alone can exercise and cannot delegate to the Executive.

The issue delegated to the Attorney General in 34 U.S.C. § 20913(d)—whether and under what circumstances the registration obligations of the Sex Offender Registration and Notification Act (SORNA) apply to convictions occurring before the Act took effect—falls squarely in the category of nondelegable legislative power. Section 20913(d) is not so much an exercise of legislative power as an invitation to the Executive to exercise it however it would like.

To begin with, the delegation gives the Attorney General the power to define a federal crime—and one that in almost all circumstances is premised on prior state convictions. The delegation accordingly falls within two trends that call for reinvigorating the constitutional constraints on federal lawmaking. The first is the increasing criminalization of conduct that does not fall within traditional categories of

crime based on nearly universal principles of right and wrong, but instead is a failure to comply with new regulatory obligations that are a step or two away from a harm to person or property. The second is the increasing federalization of criminal law, under which traditional matters of state concern like assault and arson—and failure to register as a sex offender—become federal crimes.

Affirmance here would exacerbate both problems. Should the Attorney General's delegated right to create crimes be upheld, little would stop Congress from adding to the horde of statutes providing that breaching any of a set of regulations is a federal crime. And the underlying—but now criminalized—regulations may be issued under no more guidance than a direction to issue rules "carry out the purposes of this chapter." *E.g.*, 12 U.S.C. § 1244(b).

The aggressively expanding scope of the federal criminal law makes it critical to apply a standard for lawful delegation that contains meaningful limiting criteria. A higher standard is necessary at a minimum in the criminal context, where parallel doctrines may invalidate criminal statutes as void for vagueness, or may require a limited interpretation under the rule of lenity. Delegated legislative power cannot allow a member of the Executive Branch to make unguided but fundamental policy choices about which conduct should be criminally punished. The delegating language cannot merely raise questions for an executive agency to resolve. Rather, it must provide answers for an agency to implement.

If the Court chooses to retain the "intelligible principle" formulation to evaluate delegations of the legislative power, it must restore substantive constraints to the standard for intelligibility. It is not

enough to identify the general subject matter and instruct the agency to make rules about it. Rather, the agency to which power is delegated must receive intelligible guidance on how to resolve any questions delegated to it.

Finally, under any plausible standard, the delegation in Section 20913(d) is unconstitutional. Not only does the Attorney General lack concrete guidance on the rule to be applied to pre-enactment sex offenders, he lacks any guidance at all. He wasn't even directed to make *any* rules about the retroactive application of SORNA. Rather he could do nothing, as one Attorney General did. Congress must either provide the answers to be implemented by the agency, or the analysis to be used within a narrow band of options.

ARGUMENT

A. The Increasing Criminalization of Conduct and Federalization of Criminal Law—Exacerbated by the Widespread Blanket Criminalization of Federal Administrative Regulations—Magnify the Need to Enforce the Constitutional Limits on Delegation.

The delegation issues raised by SORNA's retroactivity provision are especially acute because that provision allows the Executive to define the very crimes it prosecutes. Section 20913(d) is an extreme example because it is not only the Executive, but its prosecutorial arm, that received plenary power to make the fundamental policy choices about what behavior to criminalize. Worse than that, Section 20913(d) allows the Attorney General to decide addi-

tional obligations, enforced by criminal sanctions, based on significance of *past* conduct that has been punished by the States.

For centuries, the consolidation in the Executive of the power to define crime and the power to prosecute it has been recognized as among the worst possible breaches of the separation of powers. See 1 W. Blackstone, Commentaries on the Laws of England 142, 271 (1765). Indeed, "[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc)

The trend toward allowing the Justice Department to fill in and (as here) even create the elements of new crimes drew sharp criticism from General Thornburgh when Congress investigated the burgeoning creation of new, poorly defined crimes that occupy an ever-wider range of possible human conduct. "The unfortunate reality is that the Congress has effectively delegated some of its most important authority to regulate crime in this country to Federal prosecutors who are given an immense amount of latitude and discretion to construe Federal crimes and not always with the clearest motives or intentions." Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. On the Judiciary, H.R. Serial No. 111-67, 111th Cong., 1st Sess. 6 (July 22, 2009) (testimony of Hon. Richard Thornburgh, former Attorney General). Others have observed the dangerous combination of comprehensive regulation of an ever-expanding area of private life combined with

statutes making violation of a regulation into a crime and with the enormous prosecutorial discretion that results from the minimal-to-nonexistent guidance provided to prosecutors, judges and juries. See generally Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Colum. L. Rev. Sidebar 102 (2013); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 6 Buff. Crim. L. Rev. 165 (2004).

In addition, under current law, statute after statute criminalizes violations of administrative regulations within a defined range of subject matter, regulations that have little obvious connection to the terms any statute passed by both Houses of Congress and presented to the President. In those circumstances, one wing of the Executive Branch defines a crime while the Justice Department brings any criminal prosecution. The dividing line is not sharp, however, given the range of injunctive relief and fines that an administrative agency may impose. More than 25 years ago, these bootstrapped crimes had brought the number of regulations enforceable under the criminal law to more than 300,000. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L.Rev. 193, 216 (1991)

Adding to the imbalance among the branches, executive agencies' now-criminalized regulations may receive the benefit of deference under *Chevron U.S.A., Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). This Court has declined to apply *Chevron* to criminal statutes. See Pet. Br. 21. Yet agencies routinely command deference for regulations that may have criminal consequences, and

indeed there is substantial academic support for extending *Chevron* into the criminal context, suggesting that lower courts may do indirectly what this Court forbids them from doing directly. Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. Pitt. L. Rev. 1, 3 (1996) (arguing that Chevron deference should not be subject to proposed exceptions for the strict interpretation of criminal and deportation statutes); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 469 (1996).

Agencies also receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), for their interpretations of those regulations. Even if this Court limits the scope of *Chevron* and *Auer* deference, the lower courts may be slow to change their ways, which could result in wrongful convictions that go unremedied for years if they are remedied at all.

The increasing intrusion of federal criminal law into areas long reserved for the States provides another reason to enforce nondelegation principles in the criminal context. This Court has addressed and corrected some instances where Congress has intruded too far into the police power of the states by adding federal punishment to conduct, including violent crime, that is quintessentially local. See, *e.g.*, *Jones* v. *United States*, 529 U.S. 848 (2000) (arson); *United States* v. *Morrison*, 529 U.S. 598 (2000) (assault and battery). Taking steps to ensure that an act of Congress, rather than an unguided agency decree, is necessary to expand the scope of federal criminal law protects federalism as well as the separation of powers.

The growth of the federal administrative apparatus, and of criminal penalties for regulatory violations, sharpens the need for enforcement of all doctrines relating to the separation of powers. As one commentator has observed, "[t]he abandonment of the Constitution's single modes of exercising legislative and judicial powers has thus allowed the government increasingly to leave behind many of the constitutional limits on such powers, and to leave the public subject to mere administrative command." Philip Hamburger, Is Administrative Law Unlawful? 342 (2014). This case is simpler because the prosecutor received the unlawful delegation of legislative power, but the Court should ensure that the Congress cannot achieve the same result simply by adding another Executive Branch agency to the mix.

B. Delegations of the Legislative Power to Make Criminal Laws Must Provide Constraints More Meaningful Than An "Intelligible Principle."

This Court has recognized that defining crimes is "strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). The Court has recognized that the degree of specificity required of Congress is greater for criminal statutes. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The void-for-vagueness doctrine, like the nondelegation doctrine, "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Ibid.*

For nearly a century, the Court has upheld delegations of legislative power so long as the Congress has provided an "intelligible principle" for the exercise of the delegated power. *J.W. Hampton Jr. & Co.* v. *Unit-*

ed States, 276 U.S. 394, 409 (1928). Regrettably, the standard of intelligibility has shrunk. While once a directive to preserve "fair competition" failed the test, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522 (1935), the Court has since divined an "intelligible principle" from mere authority to regulate in "the public interest." *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 474 (2001) (citing *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225–226 (1943), and other cases).

If avowed service to the "public interest" is enough, than an "intelligible principle" is no more than an imaginable relation between the text of a statute and the substance of a regulation. The more chameleon-like the statutory terms, the more incapable of failure an agency's articulation of a new crime.

As the Court has suggested, that degree of intelligibility is insufficient to sustain a delegation of the power to define a crime. Without specifying the correct standard, the Court responded to an argument that a higher standard applies to delegations in the criminal context by upholding a statute because it "meaningfully constrains" the Attorney General's power to add drugs to a schedule of unlawful substances. See *Touby v. United States*, 500 U.S. 160, 166 (1991).

A meaningful-constraint standard could provide greater insulation from the risk of an arbitrary exercise of power by the Executive Branch. But that standard itself requires greater articulation if it is not to suffer the same semantic dilution that overtook "intelligible principle."

Before joining this Court, Justice Gorsuch suggested three concrete elements of a meaningful con-

straint: "(1) Congress must set forth a clear and generally applicable rule * * * that (2) hinges on a factual determination by the Executive * * * and (3) the statute provides criteria the Executive must employ when making its finding." *United States v. Nichols*, 784 F.3d 666, 673 (Gorsuch, J., dissenting from denial of rehearing en banc).

A slightly different, but consistent formulation would require the Congress must make every meaningful policy choice underlying a criminal statute. The agency could do no more than make factual findings that, by regulation, bring specific conduct or material within a criminal prohibition. As the Court has observed (though in a decision that honored the stated principles in the breach), "[t]he essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus v. United States*, 321 U.S. 414, 424 (1944).

At a minimum, Congress must define a crime sufficiently that a reasonable citizen could deduce that particular conduct likely would come within the prohibition. And of course no citizen could make that inference without having concrete statutory guidance as to the analysis the agency must use to determine what is a crime and what is not.

C. An "Intelligible Principle" Must Do More Than Identify the Subject Matter for Delegated Lawmaking.

If the Court does not replace the "intelligible principle" formulation for delegations in the criminal context, it must require the Congress make more than the mere abstract "principle" behind a statute "intelligible" to the agency, the courts, and the citi-

zens that otherwise must guess at what is or will be a crime when regulations issue.

At a minimum, a reading of the statute must reveal whether any new conduct will become criminal, and explicitly define the factors that must enter into the agency's decision. That was what the Court required in *Touby*, where the Attorney General was "'required to consider'" three factors" before adding a new substance to a schedule of illegal drugs: "the drug's 'history and current pattern of abuse'; '[t]he scope, duration, and significance of abuse'; and '[w]hat, if any, risk there is to the public health. [21 U.S.C.] §§ 201(c)(4)-(6), 201(h)(3), 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3)." 500 U.S. at 166. In our view, even the factors at issue in *Touby* do little more than identify subject matters for agency inquiry and policy choice. As a model, however, they would add substance to the "intelligible principle" inquiry.

D. The Delegation Here Cannot Be Sustained Under Any Standard.

No matter what standard the Court chooses, the delegation in Section 20913(d) is unconstitutional. That statute delegates the most fundamental policy choice to the Executive without any constraints at all on the Attorney General's exercise of discretion. As obviously, there is nothing in the statute that resembles the factors at issue in *Touby*. And there is no "intelligible principle" under any standard because the Attorney General received complete discretion to determine whether to criminalize the conduct, and how and to what degree. If did what the Congress did not do, and chose to make the registration requirement retroactive, he could credit those with older convictions with time that otherwise would determine the length of the registration obligation. He

could require an offender who had been released 20 years before SORNA nonetheless to register for 25 years after enactment. And, as the petitioner pointed out (Pet. Br. 8-11), one or another Attorney General took all of these positions.

There is nothing "intelligible"—or constitutional—about that.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
Mayer Brown LLP
Two Palo Alto Square,
Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

Counsel for Amicus Curiae the National Association o
Criminal Defense Lawyers

JUNE 2018